

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

VOLKSWAGEN GROUP OF AMERICA, INC.
(Employer),

and

Case No. 10-RM-121704

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)
(Union),

And

MICHAEL BURTON *et alia*,
(Employee-Intervenors).

**PETITION TO REVOKE SUBPOENAS OF
TENNESSEE STATE OFFICIALS**

Pursuant to Section 102.66(c) of the Rules and Regulations of the National Labor Relations Board ("NLRB"), Tennessee Governor Bill Haslam, Economic and Community Development Commissioner Bill Hagerty, Chief of Staff to Commissioner Hagerty Will Alexander, Senate Speaker Pro Tempore Bo Watson, Tres Wittum, Executive Assistant to the Senate Speaker Pro Tempore, State Senator Todd Gardenhire, Speaker of the House Beth Harwell, State Representative and Majority Leader Gerald McCormick, State Representative Mike Carter and State Representative Richard Floyd (hereinafter "Petitioners"), having each been served with a substantially identical Subpoena Duces Tecum (the "Subpoenas"), a form of which is attached hereto, issued at the request of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (the "Union"), hereby petition to revoke the Subpoenas on the grounds set forth below:

A. **The Subpoenas are overly broad, unduly burdensome, and seek information that is not relevant or material to the matter under investigation or in question in the proceedings.**

The Petitioners are high-ranking officials and staff of the State of Tennessee with a duty to advance the interests of the State of Tennessee and to advance and protect the rights of its citizens, including those employed at the Volkswagen facility in Chattanooga. The sole basis for the Union's Objections is its assertion that public statements made by some of the Petitioners, who were acting in furtherance of that duty, somehow substantially impaired the employees' exercise of free choice and that the election therefore should be set aside. The public statements referenced in the Objections and relating to the Petitioners came from Governor Bill Haslam, Speaker Pro Tempore Senator Bo Watson, Speaker of the House Beth Harwell, and Majority Leader State Representative Gerald McCormick (hereinafter "State Officials"). To state the obvious, these are third parties, and neither employees nor agents of employer Volkswagen, the real party in interest.

NLRB procedures require that a subpoena duces tecum "should be drafted as narrowly and specifically as is practicable." NLRB Casehandling Manual, Part Two, at 11776. A petition to revoke may be based on the grounds that the subpoena "does not relate to any matter under investigation or at issue . . . or if for any other reason sufficient in law the subpoena is otherwise invalid." *Id.* at 11782. The hearing officer must ensure that the use of en masse subpoenas does not conflict with the need for a concise and complete record. *Id.* at 11210. A party should not be allowed to engage in en masse subpoenaing as a harassment device. *Id.* These procedures are designed to ensure that the process is not misused.

The use of the Subpoenas here is in total disregard of these procedures. In addition, the Subpoenas are overly broad, unduly burdensome, and seek totally irrelevant material. The

Objections filed by the Union hinge on whether public statements made by the State Officials prior to or during the election created a general atmosphere of fear or reprisal and thereby made a free election impossible. The Subpoenas seek extensive non-public documents, which have no connection to the election, for a time period encompassing at least two months *after* the election, from an expansive list of persons which includes some Petitioners who made no public comments at all, and which arguably includes all staff in the respective offices and departments of all Petitioners. The Subpoenas thus go well beyond a legitimate attempt to gather evidence relevant to the issue before The Board – whether the voters’ exercise of free choice was substantially impaired.

The Subpoenas seek information dated from January 1, 2014 “to the present” but the election was in February 2014. The Subpoenas demand production of non-public documents about which the workers voting at the Volkswagen facility could not possibly have known. The Subpoenas claim to be “continuing,” a feature that bears no relevance at all to a vote that occurred in February 2014. The Subpoenas define “you” as including the respective Petitioner both in his or her official and personal capacity as well as all persons “who have acted or purported to act on your behalf, whether in your official or personal capacity.”¹ Such a broad and sweeping definition would reach essentially every employee in several offices of the Tennessee General Assembly, and every employee in the Office of the Governor and in the Department of Economic and Community Development. “Document” is likewise expansively defined to include mostly non-public documents, such as e-mails, notes, diaries, calendars, logs, observations, and drafts of documents, none of which could possibly have been seen by or known to the workers in question.

¹ Compliance with such broadly worded definitions would entail a search involving even Petitioners’ family members, a gross overreach certainly not intended but which highlights how non-specific and broad the Subpoenas are.

There is no rational basis for such broadly worded requests, and they fly in the face of Board procedures requiring narrow and specific requests. Such non-public documents, and any statements made therein, some of which relate to a time period months after the election, could not possibly have impacted the election, and they have no bearing on the *public* statements that form the basis of the Union's Objections. These public statements are already a matter of public record.

The Union's Subpoenas thus serve only to harass the Petitioners and their various office staff; compliance would most certainly disrupt State operations. The scope and breadth of the Subpoenas, the identity and official capacity of the Petitioners who have been served, and the en masse issuing of the Subpoenas to the Petitioners (along with numerous other subpoenas) are far beyond what is necessary or appropriate for the Union to obtain evidence to support its Objections. If the Subpoenas are not revoked, the Union will be permitted to use the NLRB's procedures to subject Tennessee government officials to an abuse of process which will chill legitimate public debate, effectively silence any opposing views, and distract the NLRB from the fact that the Union lost an election it controlled in virtually every facet, except the result.

The Union's abuse of process should not be countenanced by the Board and warrants revoking the Subpoenas in their entirety.

B. The Subpoenas seek information protected by various laws, which adds to the burden and disruption caused by the Subpoenas.

The Board looks to the Federal Rules of Civil Procedure to "provide useful guidance." *Brinks, Inc.*, 281 N.L.R.B. 468, 468-69 (1986). Thus, a subpoena should be questioned when it "requires disclosure of privileged or other protected material." Fed. R. Civ. P. 45(L)(3)(A)(iii). The Subpoenas here create an undue burden because they request both testimony and the production of documents containing privileged and confidential information. The Subpoenas

seek information protected by various laws or evidentiary exceptions. The Subpoenas are so broad that they necessarily would capture information protected by: (1) the attorney-client privilege; (2) the deliberative-process privilege recognized in Tennessee, *see Davidson v. Bredesen*, No. M2012-02374-COA-R3-CV, 2013 WL 5872286 (Tenn. Ct. App. Oct. 29, 2013); (3) the statutory protection of documents relating to a commitment of public funds before any such contract or agreement is signed, *see* Tenn. Code Ann. § 4-3-730(b), (c); and, (4) the statutory protection for tax information and tax-administration information, *see* Tenn. Code Ann. § 67-1-1702.

In addition to the protections afforded these documents, these protections, when combined with the broad sweep of the Subpoenas, would require detailed review of documents for both relevance and privilege before any production. For example, assessment of the deliberative-process privilege would require extensive review of specific documents by the Attorney General's office and perhaps the Governor's counsel. Further, the Subpoenas request "drafts" of documents (which is inexplicable since drafts would not have been made public), which implicate various privileges and require review of numerous versions, notwithstanding the fact that any drafts relating to a commitment of public funds for which an agreement has not been signed is statutorily protected. Tenn. Code Ann. § 4-3-730. Some responsive documents may include tax information, which is broadly defined and aggressively protected by state statute that makes it a felony to release such information improperly. Tenn. Code Ann. §§ 67-1-1702, 1709. Responding to the Subpoenas would be so burdensome as to interfere with the various government operations of the State of Tennessee, and the information sought by the Subpoenas has such little relevance to the proceeding and does not justify such disruption. *American Elec. Power Co., Inc. v. United States*, 191 F.R.D. 132, 136 (S.D. Ohio 1999) ("generally a court must

balance the potential value of the information to the party seeking it against the cost, effort and expense to be incurred by the person or party producing it").

The Union issued the Subpoenas in search of documents and communications it knows to be protected by these privileges. The Union's failure to respect the privileges of the Petitioners is evidence of a motive beyond the fact-finding purpose that the Board intends subpoenas to serve. Petitioners, as public officials bound to protect and comply with the laws of the State of Tennessee, are compelled to assert these privileges. *See, e.g., Bryan v. State*, 848 S.W.2d 72, 79 (interest of protecting the attorney-client relationship is a mainstay of the system of justice); *In re Grand Jury Subpoena dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 552 (S.D.N.Y. 2002) (head of governmental agency must assert the deliberative-process privilege after personal review of the documents).

C. **The Subpoenas are against public policy, and the Union has not shown the requisite "exceptional circumstances" justifying the Subpoenas to Petitioners.**

The Subpoenas seek testimony and documents from individuals who are not parties to the matters before the Board. In general, courts consider the status as a nonparty to be a significant factor in the undue burden analysis. *N.C. Right to Life, Inc. v. Lecke*, 231 F.R.D. 49, 51 (D.C. Cir. 2005). "The status of a person as a nonparty is a factor that weighs against disclosure." *American Elec. Power Co., Inc. v. United States*, 191 F.R.D. 132, 136 (S.D. Ohio 1999).

Furthermore, as a matter of public policy, courts should take particular care in ensuring that the proposed testimony sought by a subpoena of a high-ranking government official is material to the matter at issue. *See State v. Easterly*, No. M2000-00077-CCA-R10-CO, 2001 WL 208514, at *5 (Tenn. Crim. App. Mar. 1, 2001). The United States Supreme Court has long recognized the need for controlling the use of subpoenas against high government officials. *See*

United States v. Morgan, 313 U.S. 409, 421-22 (1941). Because high-ranking government officials have greater duties and time constraints than other witnesses, they should not, absent extraordinary circumstances, be called to testify regarding the reasons for their actions. *In re U.S.*, 197 F.3d 310, 313 (8th Cir. 1999); *In re Kessler*, 985 F.2d 510, 512 (11th Cir. 1993); *see also Lederman v. New York City Dep't of Parks and Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (Absent exceptional circumstances, "high-ranking" government officials should not be "deposed or called to testify regarding the reasons for taking official action, including the manner and extent of his study of the record and his consultation with subordinates.") This is particularly true when the information sought may be obtained through other persons or by other means. *In re U.S.*, 197 F.3d at 313. If courts did not limit the depositions of public officials, they would spend "an inordinate amount of time tending to pending litigation." *Lederman*, 731 F.3d at 203 (quoting *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007)).

The Petitioners here are high-ranking government officials and their staff. They are not parties or representatives of a party. The Union must thus establish that "exceptional circumstances" exist so as to warrant the information sought by the Subpoenas. The Union has not demonstrated, and cannot demonstrate, that the Petitioners possess information that is essential to its case or that the information sought cannot be obtained from another source. *See In re U.S.*, 985 F.2d at 512-13. Again, the crux of the Union's Objections is that the State Officials improperly tainted the atmosphere before or during the election by making public statements, and the Union attaches these public statements, and some of the articles recounting them, as exhibits to its Objections. The Board may examine the content of the statements, and the extent of their dissemination, from the exhibits, without the need for the information requested in the broad and disruptive Subpoenas. The Union has not demonstrated any need for

the expansive set of materials sought by the Subpoenas, much less the exceptional circumstances required to justify imposing the obligation of production on these Petitioners.

D. Conclusion – The Subpoenas should be revoked in their entirety.

The Subpoenas subject the Governor, Legislative leaders, and other officials of the State of Tennessee to broad and onerous requests that infringe numerous privileges and, most importantly, are not designed to elicit any relevant evidence necessary to the Board's determination of whether the election should be set aside. Here, the right and duty of public officials to express their views in the public forum to ensure a fair process, including expressing their disappointment at apparent unfairness, does not impair the free choice of the workers. To the contrary, such public action enhances free choice – the same free choice guaranteed by Section 7 of the Act which includes the right of employees to choose *not* to “form, join or assist” a union. Such public statements are guaranteed by the First Amendment and by § 8(c) of the Act. The Board should not allow the use of its subpoena power to impair or chill the exercise of these rights. The subpoenas should be revoked.

For these reasons, Petitioners request that the Subpoenas be revoked in their entirety.

Respectfully submitted,

ROBERT E. COOPER, JR.
ATTORNEY GENERAL AND REPORTER

/s/ Leslie Ann Bridges (by permission)
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition to Revoke Subpoenas were served on this 17th day of April, 2014, on the following via NLRB e-filing, and via e-mail:

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/s/ William N. Ozier

SUBPOENA DUCES TECUM**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**To Governor Bill Haslam
1st Floor, State Capitol, Nashville, TN 37243As requested by International Union UAWwhose address is 8000 East Jefferson Avenue, Detroit, Michigan 48214
(Street) (City) (State) (ZIP)YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE a Hearing Officer
_____ of the National Labor Relations Boardat Hamilton Cty Crthse, 4th Floor, 625 Walnut Streetin the City of Chattanooga, TNon Monday, April 21, 2014 at 9:00 am or any adjournedor rescheduled date to testify in VOLKSWAGEN GROUP OF AMERICA, INC.
10-RM-121704
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHMENT

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R. Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-GZU74T

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at ,

this 28 day of March 2014


Chairman, National Labor Relations Board

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 161 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

Instructions

1. "You" means Bill Haslam, in your capacity as Governor of Tennessee and in your personal capacity, including all persons who have acted or purported to act on your behalf, whether in your official or personal capacity.
2. "Document" means any printed, typewritten, handwritten, electronic (on computer storage media, etc.), or otherwise recorded matter of whatever character, including, but not limited to, letters, memoranda, telecopy and facsimile messages, e-mails, electronic documents, notes, diaries, calendars, logs, reports, press statements, press releases, audio or visual recordings, observations, statements, formal affidavits, or any other such materials, or any carbon or photocopy of any such material, and including drafts as well as final versions of any such materials.
3. "Volkswagen" means Volkswagen AG, a German Corporation, Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, or any of them, and any affiliate or affiliates of any such entity, and all officers, employees or other persons who have acted or purported to act on behalf of any one or more than one of those entities.
4. "UAW" means the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW); any of its affiliates; officers; employees; and agents.
5. "Government Incentives" means aid or relief of any nature – whether proposed, contemplated, or effectuated – that could or would be provided by or through the State of Tennessee, the Tennessee Department of Economic and Community Development, or any other legal entity subordinate to the State of Tennessee (including all political subdivisions),

concerning or related to Volkswagen, or in whole or in part for the benefit of Volkswagen.

6. "Product Placement" means any actual, proposed or contemplated placement at Volkswagen's Chattanooga plant of the manufacture or assembly of a motor vehicle in addition to the Volkswagen Passat currently assembled at Volkswagen's Chattanooga plant.

7. "Person" means an individual; partnership; individual general and limited partners of a partnership; company; corporation; professional corporation; unincorporated association; any unit of federal, state, or local government; news and/or social media outlet, reporter or representative (whether broadcast, print, internet-based or otherwise), trust or other entity; and also includes any officers, directors, employees, agents or shareholders of any of the foregoing, as well as any of your employees or other members of your staff.

8. "Communications" means any and all inquiries, discussions, conferences, conversations, negotiations, agreements, meetings, interviews, telephone conversations, letters correspondence, notes, telegrams, facsimiles, electronic mail (e-mail), text messages, voicemails, memoranda, documents, writings, or other forms of communications, including but not limited to both oral and written communications.

9. The term "including" means including but not limited to.

10. Terms in the plural include the singular and terms in the singular include the plural.

11. The term "relating to" (including any variant thereof), includes referring to, alluding to, responding to, pertaining to, concerning, connected with, commenting on or in respect of, analyzing, touching upon, constituting and being, and is not limited to contemporaneous events, actions, communications or documents.

12. "And" as well as "or" shall be construed either disjunctively or conjunctively, as

necessary to bring within the scope of this subpoena all responses which might otherwise be construed to be outside its scope.

13. If any information is withheld under claim of privilege, state the privilege invoked and identify the subject matter (without disclosure of its contents) of the information withheld sufficient to allow to the Board to rule thereon.

14. These requests are deemed continuing. If any document requested comes into the possession, custody or control of any person acting on your behalf after the time specified herein for the production of such document, you should immediately produce such document to the UAW's attorneys for inspection and copying.

15. Unless otherwise expressly stated in writing, failure to produce any item requested herein is a representation that such item does not exist or is not in the possession, custody or control of you or any person acting on your behalf.

16. The time period covered by these requests is January 1, 2014 to the present.

17. All defined terms above, as used herein, are to be construed as defined above, whether they appear herein in capitalized or non-capitalized form.

Documents Demanded Pursuant to Subpoena Duces Tecum

Pursuant to the subpoena duces tecum, you are hereby requested to produce the following documents as to which you have possession, custody, or control:

1. All documents -- including but not limited to any communications with any person -- relating to Government Incentives, as those terms are defined herein.
2. All documents -- including but not limited to any communications with any person -- relating to Product Placement, as those terms are defined herein.
3. All documents -- including but not limited to any communications with any person -- relating to Volkswagen, as those terms are defined herein.
4. All documents -- including but not limited to any communications with any person -- relating to the UAW, as those terms are defined herein.



BILL HASLAM
GOVERNOR
STATE OF TENNESSEE

February 4, 2014

Frank Fischer
Chief Executive Officer
Volkswagen Group of America Chattanooga Operations, LLC
8001 Volkswagen Drive
Chattanooga, TN 37416

Dear Mr. Fischer:

Over the course of several months Volkswagen has been considering the prospect of establishing a works council and allowing workers to vote on that decision, which has culminated in Volkswagen announcing an election in which the employees will vote for or against union representation by the UAW. It is our hope and expectation that this process will be a fair and equitable one, allowing each employee to vote his or her conscience in an informed manner without undue influence from either side in an election by ballot. Volkswagen has indicated its consensus with this approach in the recent decision to set an election by ballot over the period of February 12-14. It is our understanding, however, that the Company is allowing the UAW to use Company facilities to advise and attempt to influence employees to vote in favor of union representation, while at the same time denying similar facilities to Volkswagen employees and groups in opposition to UAW representation. This distinction favoring the UAW at the expense of employees opposed to union representation is of concern to us. We expected the Company to assume a position of neutrality that would provide an "even playing field," if you will. It is of such concern that I felt it necessary to speak on behalf of those Tennessee citizens who are employees at the Chattanooga facility. While many will choose to differ on the advisability of union representation, there should be a general consensus that the manner in which the Company administers and oversees this process is critical not only to the Company, but also to the general perception and acceptance of any result by the employees and the community in which they live and work. Thank you for your further consideration of this issue of fairness. We are confident that Volkswagen has the employees, all of the employees, and their best interests at heart. The State of Tennessee appreciates very much the important and prominent role that Volkswagen plays in our state.

Sincerely,


Bill Haslam